

February 17. 1766.

A N S W E R S

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J A M E S B U R N S of G L E N F U I R,

T O

The P E T I T I O N of James Clark writer in
Edinburgh.

I N order to remove any impressions of the inhuman and rigorous treatment which the petitioner alledges he has met with, the respondent begs leave, in the *first* place, shortly to state to your Lordships the facts which have given rise to thi procels, and *then* to consider the defence offered on the part of the petitioner.

The respondent, on the 17th August 1757, was prevailed upon to lend the petitioner L. 50 Sterling, upon his bill payable one day after date.

The respondent having occasion for money, was obliged, on the 3d of February 1758, to indorse the above bill, for value received, to Archibald Gray; who, after doing diligence by horn- ing and caption, and not being able to obtain payment from the petitioner, had recourse upon the respondent; who was made to repeat the sum in the bill, with interest and expences.

The petitioner at this period endeavoured to persuade the respondent, that he was entirely insolvent, and unable to pay his debts; which induced the respondent the more readily to accept of an offer made to him by John Craig shoemaker in Edinburgh, viz. That he would pay him L. 20 Sterling per advance, and

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gave him his bill for L. 20 more, payable at Candlemas 1759, if he would assign over to him the debt due by the petitioner. To this the respondent agreed, by a signed missive, in order to free him from the disagreeable necessity of pouding the petitioner's household-furniture; the value of which would have greatly exceeded his full debt.

Mr Craig, some time after the term of Candlemas, hearing, that Mr Burns was going out of town about some particular business, purposely made offer of the money to the respondent; which he then could not accept of, as he was going that very moment to the country, and had no use for it till his return. Upon this some high words passed betwixt them, and Mr Craig took a protest for his not accepting.

Immediately on his return from the country, which happened very soon after, the respondent went to Mr Craig, and offered to assign him the debt on payment of his bill; which Mr Craig then refused; and after repeated demands, he required him, under form of instrument, either to pay the bill, and accept of the assignation, or take back the L. 20 he had paid him, and give him retrocession of the debt due by the petitioner. He was then brought under the necessity of raising a process against Mr Craig before the bailies of Edinburgh; who, by advice of their assessors, ordained the respondent to lodge in process an assignation of Mr Clark's debt.

Feb. 14. 1764. The respondent, unwilling to put Mr Craig to any unnecessary expences; and being still in hopes of recovering payment in an amicable way, delayed proceeding any further for near two years; at the end of which, finding his indulgence was to no purpose, he lodged the assignation according to the bailies interlocutor, and obtained decret against Mr Craig for the L. 20 Sterling, in his bill, with interest and expences, amounting in all to about L. 27 Sterling.

The respondent still delayed some months longer to charge him upon this decret; but at last his patience being wore out by the trouble and delays that he had met with, he ordered his procurator to proceed in doing diligence against him.

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Mr Craig then finding himself under the necessity of paying the sum in the decret, and having little hopes of recovering it from the petitioner, wrote the respondent the following letter. April 1764.

“ Sir, Notwithstanding of your indulgences, it is quite inconvenient for me to pay you the sums in your decret against me, which now amount to L. 27 : 4 : 6 Sterling, including the expences in said decret ; which, after seeing Mr Eiston’s account, I believe to be all expended, and justly due. I purchased this debt of James Clark’s from you on purpose to serve him ; and although Mr Clark is to reap the whole benefit, yet he either postpones or refuses his relieving me :— I therefore agree to put you in your own place against Mr Clark, that you may, if you please, try to recover your payment by raising diligence against himself.— If you accept of this, you will be accountable or allow to James Clark the L. 20 Sterling I have paid, with the interest since the advancement ; but deducing therefrom the L. 3 of expences in the decret against me, together with 5 s. also debursed by you.— I have not your letter to give you up, by which you oblige yourself to assign me this debt ; but I declare it to be null, in case you should proceed against Mr Clark ; and if any further is necessary, I promise and oblige myself to grant a formal disposition and transference in your favours, so soon as you demand it.— And whether you shall accept of this or not, I hope you will continue your indulgence for eight days longer ; against which time, if you do not take this retrocession against James Clark, I shall be sure to pay you the above L. 27 odd shillings, or find you a sufficient man to join me in a bill therefor, payable at Whitfunday next, including the interest ; and I am, &c.”

This offer the respondent was advised to accept of : which he the more readily did, as he understood that the insolvency of the petitioner was entirely affected ; for, by a list which he himself had given in to some of his creditors, it appeared, that his

debts did not exceed L. 950 Sterling, and his effects were upwards of L. 3000.

The respondent accordingly took a disposition and transference from Mr Craig of the foresaid debt due by the petitioner: to whom he gave a charge of hórning for the principal sum and interest, with deduction of the L. 20 Sterling he had received from Mr Craig; but did not proceed to do any further diligence for a considerable time. At last, having no hopes of obtaining payment by any other method, he was put under the disagreeable necessity of giving orders to poid his effects. This produced a number of letters from different quarters, interceding for a further delay in behalf of the petitioner; to which the respondent readily gave ear. The effect of which was, that the petitioner, in the mean time, offered two bills of suspension; the one upon insufficient, the other upon juratory caution; both of which were refused. He then offered a third; which, upon sufficient caution being found, was passed; and came of course to be discussed before Lord Stonefield Ordinary.

At a calling of the cause, his Lordship found the letters orderly proceeded. Against this interlocutor a representation, and answers thereto, were given in. Upon advising of which, his Lordship was pleased to adhere. A second representation was offered on the part of the petitioner; and his Lordship, of this date, pronounced the following interlocutor. " Having considered this representation, with the former procedure, and in respect the charger agrees, that there be deduced from the sums charged for, the sum of L. 20 Sterling, finds the suspender intitled to deduction thereof; and with that variation refuses the desire of the representation, and adheres to the former interlocutor."

From the whole of these proceedings, the respondent flatters himself, that he will not appear in that rigorous and oppressive light in which the petitioner has represented him; and that there are few instances of a creditor's behaving with more lenity and compassion than the present. Even during the dependence of this

this action before the Lord Ordinary, the respondent made offer of a composition; and matters were actually settled betwixt their agents; but Mr Clark would not stand to the agreement; upon which his then agent would have no more to do with his affairs.

The petitioner has thought proper to reclaim against the Lord Ordinary's interlocutor; and the respondent shall now shortly consider the point of law on which he founds his defence.

The petitioner alledges, That it was entirely *ultra vires* of Mr Craig to grant a retrocession of the debt to Mr Burns; that Mr Craig could only be considered as the petitioner's cautioner and trustee, interposing his credit, and advancing his money solely for the behoof of the petitioner; and that thereby there was a *jus quæsitum* to him, which Mr Craig could not deprive him of.

The respondent must confess he is at a loss to discover upon what medium or principle of law this doctrine of the petitioner's is founded.

Had Mr Burns delivered up the old bill, and accepted a new one from the petitioner, for L. 40 Sterling, and Mr Craig become either cautioner, or conjoined with him in the said bill, he might have had some foundation to have claimed a *jus quæsitum*; but in his present situation he can have none.

Mr Craig got an assignation to Mr Burns's debt, upon certain conditions, which, if implemented, would have obliged Mr Burns to transfer the debt to him. But, from these conditions, the parties certainly had it in their power to refuse whenever they had a mind. The petitioner was neither present, nor even his name mentioned in the assignation; so that it was entirely *a res inter alios acta* with respect to him, whatever consequential interest he might afterwards have reaped from it.

The respondent does not mean to infer from this doctrine, that an obligation or contract entered into expressly in favour of a third party, though without his consent, will not be binding. In that case, there is no doubt a *jus quæsitum tertio*, and that third party

party may compel them to implement the obligation. But in the present case, the most that can be inferred, was a bare resolution on the part of Mr Craig, to deliver up the bill to the petitioner on the same terms that he had received it from the respondent. This resolution was only an act of the will, and can therefore never be obligatory, however fully evidenced, either by word or writ. This is a principle so uncontroverted, that it is needless to trouble your Lordships either with authorities or decisions to support it.

The petitioner has no reason to complain of Mr Craig's conduct in this matter. Mr Craig wished to procure a composition to the petitioner; and for that purpose entered into the agreement with the respondent: but finding that he was unable to perform his part of that agreement, he had nothing left but to reponne the respondent to the full right of the debt originally due him, deducting only the sum of L. 20, which had been paid in part thereof.

Upon the whole, then, the petitioner has sustained no damage or hurt from any of the proceedings. The respondent is only demanding payment of a debt which is justly due to him, which has been long delayed, and which was entirely constituted to serve the petitioner, and not the respondent.

In respect whereof, &c.

WILL. OLIVER.

